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In the Supreme Court of the United States

OCTOBER TERM, 1985

ESTATE OF ALICE B. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner challenges the court of appeals' holding that it lacked "reasonable cause" for late filing of its estate tax return and late payment of its estate tax, and that it was in consequence liable for statutory penalties.

1. Alice B. Smith died testate on May 22, 1974. Her nephew, Thomas E. Barr, was appointed executor of the estate. Mr. Barr is an attorney with experience in handling probate matters. He retained Joseph Phillips, a certified public accountant, to prepare the federal estate tax return. He also retained two appraisers to provide opinions as to the value of the decedent's real estate and mineral interests (Pet. App. 17).

An estate tax return is required to be filed, and the estate tax paid, nine months after the decedent's death (26 U.S.C. 6075(a)). Petitioner's return was accordingly due on

February 22, 1975. Petitioner requested, and the IRS granted, two extensions of time to file the return and pay the tax, the second extension running to August 22, 1975 (Pet. App. 17-18). On July 15, 1975, petitioner requested a third extension of time, to November 22, 1975, stating that the additional time was necessary to complete appraisal of the real property interests. On the application, the executor typed the following: "[p]lease advise if we should mail a payment to avoid any penalty" (1 R. 80).

The Commissioner approved the requested extension of time to pay the tax, but not the requested extension to file the return. The application was accordingly returned to the executor with the following explanation: "[A]n extension of time to file the return cannot exceed six months from the original due date of the return unless an executor is abroad. You should attach a statement to the return when filed stating why the return could not be filed timely" (1 R. 80). The executor received from his appraisers on December 9, 1975, an opinion as to the value of the decedent's real estate interests. The estate tax return was filed, and the tax was paid, on March 24, 1977, more than one year and three months later (Pet. App. 18).

In a statutory notice of deficiency, the Commissioner asserted additions to tax (generally called "penalties") in the amount of $69,555 under 26 U.S.C. 6651(a) for late filing of the return and late payment of the tax (1 R. 2). The estate paid these amounts and filed an administrative claim for refund (1 R. 13). Upon its denial, the estate filed this refund suit in district court seeking inter alia a refund of the late-filing and late-payment penalties. The executor contended that his delay in filing and payment was "due to reasonable cause and not due to willful neglect" (26 U.S.C. 6651(a)(1)). The estate argued that the executor had relied on the advice of his accountant that no penalty would be assessed against the estate, that the delay in filing was due

to circumstances (*e.g.*, delay by the appraisers) beyond the executor's control, and that the executor had relied on so-called advice from the IRS that no penalty would be imposed. The district court granted judgment for the government on all issues (Pet. App. 23-24).

The court of appeals affirmed in a per curiam opinion (Pet. App. 14-22). It noted that, under this Court's decision in *United States* v. *Boyle*, No. 83-1266 (Jan. 9, 1985), a taxpayer seeking to avoid the late-filing penalty "bears the heavy burden of proving both (1) that the failure did not result from 'willful neglect,' and (2) that the failure was 'due to reasonable cause' " (slip op. 4, quoting 26 U.S.C. 6651(a)(1)). The court of appeals noted that the evidence was largely uncontested and held that "[t]he record fully supports the district court's rejection of the various excuses for late filing and payment advanced by the executor" (Pet. App. 16-17).

2. The court of appeals' decision is correct. Under the controlling regulation, a taxpayer who fails to file a return or pay taxes on time can avoid the consequential penalties only if he affirmatively shows that he exercised "ordinary business care and prudence" in attempting to meet the deadlines. Treas. Reg. § 301.6651-1(c)(1). Here, the return was filed and the taxes were paid over a year and three months late, following multiple extensions of time granted by the Commissioner. The estate blamed the delay on a variety of causes—negligence by appraisers, press of other business—but all of those excuses have been carefully considered and weighed by two courts, both of which have concluded, based on ample support in the record, that the estate failed to prove that the lateness was due to "reasonable cause." The overriding fact, which is undisputed, is that the executor, an attorney, was at all times aware of the deadlines and fully capable of meeting them. These circumstances preclude, as a matter of law, the existence of

"reasonable cause" for his failure to file on time and pay the tax when due. *United States* v. *Boyle, supra.*

Petitioner's sole contention at this point (Pet. i, 10-11) seems to be that the executor was entitled to infer, from the IRS's failure explicitly to "advise [him] if [he] should mail a payment to avoid any penalty" (1 R. 80), that he was not required to pay the tax on time. Petitioner contends that the Commissioner's actual response—a direction to " 'attach a statement to the return when filed stating why the return could not be filed timely' "—suggested to him that "making said attachment to the return would excuse any penalty" (Pet. 8, 11). In effect, petitioner argues that he inferred from the Commissioner's response that *any* reason he might see fit to give would satisfy the Internal Revenue Service. In view of the actual state of the law, and the fact that the executor was an experienced probate attorney, the court of appeals was plainly correct in holding that "[s]uch an inference was manifestly unjustified" (Pet. App. 21). In any event, the question is entirely factual. Petitioner alleges no conflict among the circuits, and there is no other consideration warranting this Court's review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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